

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
UNITED STATES OF AMERICA : :
 : :
-vs- : Case No. 1:12-cr-3
 : :
KIM DOTCOM, et al., : :
Defendants. : :
-----: :

HEARING ON MOTIONS

April 13, 2012

Before: Liam O'Grady, Judge

APPEARANCES:

Jay V. Prabhu, Lindsay A. Kelly and Glenn C. Alexander,
Counsel for the United States

Paul F. Brinkman, William A. Burck and Ira P. Rothken,
Counsel for Defendant Megaupload

Marc J. Zwillinger, Robert Huff, Jr. and Christopher L. Harlow,
Counsel for Carpathia

Julie P. Samuels and John S. Davis, V,
Counsel for Kyle Goodwin

W. Clifton Holmes, Counsel for Valcom and Microhits

Paul M. Smith and Julie M. Carpenter, Counsel for MPAA

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COURT'S RULING

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1 THE CLERK: Criminal case number 1:12-cr-3, the
2 United States of America versus Kim Dotcom, et al.

3 Counsel please identify themselves for the record.

4 MR. PRABHU: Good morning, Your Honor. Jay Prabhu,
5 Lindsay Kelly and Glenn Alexander for the Government.

6 THE COURT: All right, good morning.

7 MR. BRINKMAN: Good morning, Your Honor. Paul
8 Brinkman and William Burck from Quinn Emanuel Urquhart &
9 Sullivan, and Ira Rothken from The Rothken Law Firm.

10 THE COURT: All right. Good morning to each of you.

11 MR. ZWILLINGER: Good morning, Your Honor. Marc
12 Zwillinger and Bart Huff from ZwillGen on behalf of Carpathia,
13 with local counsel Chris Harlow from SNR Denton.

14 THE COURT: All right, good morning.

15 MS. SAMUELS: Good morning, Your Honor. Julie
16 Samuels from the Electronic Frontier Foundation here with John
17 Davis on behalf of Kyle Goodwin.

18 THE COURT: All right. Good morning, ma'am.

19 MR. DAVIS: Good morning.

20 THE COURT: Good morning.

21 MR. HOLMES: Good morning, Your Honor. Cliff Holmes
22 of Dunlap, Grubb & Weaver on behalf of nonparties Valcom,
23 Incorporated and Microhits, Incorporated.

24 THE COURT: All right, good morning to you, sir.

25 MR. HOLMES: Thank you.

1 MS. CARPENTER: Good morning, Your Honor. Julie
2 Carpenter on behalf of the MPAA members. And with me is Paul
3 Smith, who has been admitted pro hac vice, and he will be
4 arguing this morning.

5 THE COURT: All right, good morning to each of you.

6 All right, there is a series of motions on. The
7 vehicle for getting here was Carpathia's motion to be relieved
8 of the financial responsibility of continuing to store the data
9 from Megaupload. So, why don't we start there.

10 I have read your pleadings, and I am sympathetic to
11 your position. And I understand you have a board that you want
12 to use as a demonstrative?

13 MR. ZWILLINGER: That's right, Your Honor.

14 THE COURT: Certainly, go ahead.

15 MR. ZWILLINGER: Your Honor, I thought it would be
16 helpful to start with just a brief description of the role
17 Carpathia played as a service provider in this case, and then
18 to show some pictures of the servers at issue.

19 If I can show the other picture first.

20 THE COURT: The other parties have had an opportunity
21 to look at those? All right, why don't you--

22 MR. ZWILLINGER: Your Honor, Carpathia is a web
23 hosting company. And what we did in this case is we provided
24 managed hosting services to Megaupload. That means we provided
25 the physical server hardware, the physical security. We were

1 responsible 24/7, 365 days a week to make sure the physical
2 hardware was working.

3 So, with our partner Equinix, we supplied power, we
4 supplied cooling, we did the connectivity to the other
5 computers in the data center, we replaced the drives that
6 failed every day.

7 We didn't run or manage the Internet sites. We had
8 no access to the computers at all. In fact, we just ran the
9 platform. And when I say we had no access, it's because when
10 we set up the servers and gave the default passwords to
11 Megaupload, they would invariably change the passwords
12 immediately to control access. So, we were responsible for the
13 platform only.

14 And at the time up to the point the Government
15 executed the search warrant, Exhibit A, this picture, is what
16 the servers looked like. You're looking at nine servers in a
17 rack and three racks of servers. Each one of those servers has
18 24 hard drives in it. They are about one-and-a-half terabytes
19 per hard drive. Which means there is about 30 to 40 times more
20 computing power in each one of those servers than a computer
21 that might be sitting on your desk.

22 We have 83 racks of those storage servers, and we had
23 them in four locations across the United States. The majority
24 of them were in the Equinix data center here in Ashburn,
25 Virginia. But we also had servers in LA, Phoenix and Toronto.

1 The out-of-pocket costs of keeping all these servers
2 powered, cooled and running was running about \$9,000 a day.
3 So, when the Government executed the search warrant in this
4 case and Mega stopped paying and could no longer be in
5 business, we needed to get out of our, the data centers. And
6 so, those contracts, which we didn't maintain, ended on
7 April 6.

8 On April 6 we started bringing all the servers to
9 Harrisonburg, Virginia, which is in the jurisdiction of this
10 court, and we brought the servers from all over the country,
11 even though the search warrant pertained only to the ones in
12 Virginia and Toronto.

13 If you look at Exhibit B, Your Honor, this is a
14 picture of what the servers look like now. They are in the
15 process of all being off-loaded and stacked in Harrisonburg,
16 Virginia. You will see that they are stacked eight servers
17 high. There are four stacks pictures or five stacks pictured.
18 So, you have 40 servers there.

19 At the end of the day when they finish arriving, we
20 are going to have 120 stacks of these things in a climate
21 controlled data center. It is climate controlled because
22 without climate control, the hard drives tend to fail.

23 So, the servers are all sitting there, and we are
24 going to have 120 stacks of those, and that would be space that
25 would be otherwise used for customer servers.

1 Moving for a protective order wasn't our first choice
2 or first step in this case. We waited patiently for several
3 weeks to think that the Government and Mega might work out a
4 plan for the disposition of the servers.

5 Then we tried to talk to the Government about the
6 Government taking possession of the servers. And finally, we
7 worked out an arrange with Mega so that Mega would take
8 transfer of the physical servers to unite their interest in the
9 data that's on them with the physical hardware.

10 The Government and the MPAA objected to that
11 transfer. And then we felt like we had to turn to the Court.

12 It seems to us there are a lot of parties that have
13 interest in the data on these servers except for one, and
14 that's us. We have no interest in the data.

15 Our only interest was in the physical hardware. And
16 even that we are willing to loan to any party in this case to
17 take possession of the physical hardware until the duration of
18 the proceeding and the hardware can be returned.

19 Even before today's hearing, we went to all of the
20 parties to see if there was something that could be worked out
21 that we could make a joint recommendation to the Court. And it
22 turns out every party but one agrees that their interests would
23 be served, in fact better served if the servers were in the
24 hands of the Government. The party that doesn't agree, of
25 course, is the Government.

1 I think the reason that it makes sense for the
2 Government to have them in these circumstances is the
3 Government can address each of the parties' interests in known
4 defined ways. There is an established procedure in the
5 criminal law for the defendant to get access to material
6 evidence under rules of criminal procedure. Third parties,
7 like Mr. Goodwin, can get access through the forfeiture rules,
8 21 U.S.C. 853(h), if they are innocent owners of the data the
9 Government has. And the interests of the copyright holders can
10 be satisfied because there won't be any further distribution of
11 what they allege to be infringing material.

12 And the Government spends a lot of time explaining in
13 their briefing why Mega shouldn't be able to force them to take
14 the servers. I understand that, but they don't explain why
15 Carpathia should be forced to take the servers instead.

16 In fact, I would like to point out that the
17 Government's interest in the servers, aside from being way more
18 than Carpathia's, is that they alleged in the indictment,
19 paragraph 112, page 82 of the indictment, that they were
20 entitled to forfeiture of all the copyright infringing
21 materials that are possessed by Mega. Those materials are
22 possessed on the servers.

23 So, if all of the infringing materials are subject to
24 forfeiture of this Court, we think it's another reason why the
25 Government should be taking possession of them.

1 Two other things, Your Honor, finally. The
2 Government makes some allegation, it is not very specific, but
3 they believe that there might be some child pornography on
4 these servers, and that's why we shouldn't be able to transfer
5 them. It's not with a lot of specificity so that we can figure
6 where on these 25 petabytes of data this child porn might
7 reside. But if there is contraband on the servers, we
8 certainly shouldn't remain in possession of them. Those should
9 be turned over to Government.

10 And finally, the last minute request that was made
11 last night from Valcom and Microhits to preserve certain
12 aspects of the data, specifically the server logs, proves our
13 point exactly. I know that is a separate civil matter, but for
14 us, preservation is all or nothing. We just preserve the
15 entirety of the data or preserve no data.

16 We can't get access to log in and get the server
17 logs. There are only two parties that can do that, Megaupload,
18 who has the passwords and controlled the data, and the
19 Government, who in the course of executing the search warrant
20 found a way to bypass the password protection and do the
21 imaging they need, we can't do that. So, asking us to preserve
22 the server logs is asking us to preserve all 25 petabytes of
23 data until someone can access it.

24 THE COURT: So, all the hard drives are going to
25 Harrisonburg, Virginia to storage in a climate controlled

1 warehouse.

2 How much is that costing?

3 MR. ZWILLINGER: The space, the lease space in that
4 warehouse that will allocated to the servers will be about
5 \$37,000 a month.

6 THE COURT: \$37,000 a month. All right.

7 MR. ZWILLINGER: And they are not powered or cooled
8 or running or networked, they are just sitting there awaiting
9 final disposition. They are just stacked.

10 THE COURT: Right. And they are unavailable for
11 Carpathia to lease to somebody else as well.

12 MR. ZWILLINGER: That's correct.

13 THE COURT: And did Carpathia get notice from the
14 Government at any time prior to the seizure that they were
15 storing pirated copyright material and they were subject to any
16 criminal violations?

17 MR. ZWILLINGER: No, not in that way, Your Honor.
18 Occasionally in the years of hosting Mega, there would be a
19 specific instance where the Government would, you know, execute
20 a, serve a subpoena or execute a search warrant for a small
21 portion of data. One was done a year prior by this very
22 office.

23 So, there have been instances in the years of hosting
24 that somebody had made a specific request for a specific piece
25 of data, but we had no notice that 1,100 servers, or at least

1 in Virginia 500-plus servers would be seized and taken as
2 criminal violations.

3 THE COURT: In negotiating with Megaupload to
4 transfer the, what was your understanding of the agreement
5 between Carpathia and Megaupload to transfer the hard drives?

6 MR. ZWILLINGER: Well, it morphed a little bit over
7 time. The agreement we signed involved the full transfer of
8 all of the 1,100 servers for payment of a million dollars.
9 There was an additional fee for a continuing to host them until
10 April 6. That's obviously passed. But the sale of the servers
11 was for a million dollars, which is slightly under their book
12 value.

13 At the time we originally proposed it, there were no
14 particular restrictions on what Mega was going to do with it,
15 other than it was for use in the criminal case. Subsequent to
16 that, they offered to make several series of restrictions on
17 how they would and would not use it, which I could better let
18 them address if they are allowed to you. But it was our
19 understanding that it was going to be used just for use in the
20 criminal case.

21 THE COURT: Okay. All right. Thank you, sir.

22 MR. ZWILLINGER: Thank you, Your Honor.

23 THE COURT: Why don't we lead off with the Government
24 responding.

25 MR. PRABHU: Thank you, Your Honor.

1 Just so the record is clear, the Government is not
2 seeking the destruction of the content of the Mega servers at
3 issue here. In fact, it was the United States that publicly
4 notified the Court and any interested parties on January 27,
5 2012, that the hosting companies were planning on wiping the
6 content of those servers. As the Court will recall, I filed a
7 letter with chambers that was publicly filed.

8 If not for the Government's notice at that time, it
9 is very possible that the companies, including Carpathia, would
10 have destroyed the data within days of the Government's
11 searches and the issues today would not be before the Court.

12 During the investigation of this case--

13 THE COURT: What's the Government's-- I understand
14 that. I promise you, I read the pleadings. And so, here we
15 are today. The Government has done a sampling. Obviously, the
16 defendants are very interested in trying to undermine the
17 legitimacy of the sampling done, and in an attempt to
18 ultimately free up some assets for use in defending the action.
19 And I would predict that any Farmer hearing would go that way.

20 So, the Government doesn't need the remaining stored
21 information?

22 MR. PRABHU: That's correct, Your Honor.

23 THE COURT: And they have what they need. And so,
24 the issue now is whether it's going to be preserved.

25 Megaupload has made an offer. I don't know where

1 they are going to get a million dollars to buy it, but say they
2 have got a million dollars to buy the hard drives from
3 Carpathia, what's the Government's objection to that?

4 MR. PRABHU: Well, first of all, Your Honor, the
5 Government was notified during its discussions with Carpathia
6 and Mega that a civil preservation demand had already been
7 served on January 31, 2012, for these exact servers by the
8 Motion Picture Association. And we were not notified by those
9 parties that we were dealing with. In fact, we heard that from
10 MPAA directly.

11 And once we were told that there was a preservation
12 request, us being involved in allowing a transfer of allegedly
13 infringing materials to the infringer, become an unacceptable
14 situation.

15 So, the Government's hands were tied at that point.
16 We couldn't allow the servers to be transferred, and yet we
17 were being asked to approve this deal. And so, we stopped, we
18 basically stopped negotiating at that point.

19 The question of whether they could transfer them is
20 very complicated, as the Court obviously knows, because, first
21 of all, it would be putting evidence of a civil matter in the
22 hands of the defendant. And in fact, now, as opposed to when
23 we filled our initial pleadings in this case, there is actually
24 a civil matter in front of this Court.

25 And so, preservation of those materials can be done

1 purely in the civil process. And to be clear, Carpathia is not
2 a third party that has no interest in this case. They are a
3 potential defendant in other proceedings related to these
4 servers because, as they just said, they ran these servers for
5 years. And it's unclear their level of knowledge, as Valcom
6 indicates in their filing, and they might be a defendant.

7 One thing is clear, Carpathia did make \$35 million
8 plus hosting these servers for Megaupload. They got thousands
9 of notices of infringement from copyright holders. And so,
10 it's not like this was really a surprise.

11 Also, with all due respect, they are being a little
12 bit disingenuous about their ability to access these servers.
13 They could do exactly what the Government did, which is hire
14 forensic persons to access the data directly and go around the
15 passwords. Megaupload was able to do it. Carpathia could do
16 it.

17 And so, forcing the Government to step in and take on
18 responsibility for these servers, would just be a massive
19 burden on the Government and the taxpayers.

20 And in the filings by the different parties in this
21 case, it shows what would happen. Mr. Goodwin could, under the
22 rules, force the Government to go get his files. And now he
23 has that remedy, he could go to Carpathia and say, you have my
24 property. If he has a legal claim, he can make that case. Or
25 he could pay them.

1 And the problem with all these solutions is it
2 presupposes that the Government can do all these things and
3 Carpathia can't. That's not the case.

4 If they have contractual issues about the data that
5 they have in their possession, those can be dealt with in civil
6 litigation, they can be dealt with in negotiation, but they
7 just want to get out. And, Your Honor, there is no reason just
8 because they want to get out, that you have to push the
9 Government in.

10 And frankly, the burden on the Government is much
11 greater than it is to Carpathia because of the ongoing criminal
12 case. If it's in our custody and control, it introduces
13 petabytes of information that we are going to have to deal with
14 the defendant on, defendant Megaupload on.

15 In every search warrant the Government executes, it
16 always has to figure out what it can seize reasonably. And
17 that's what happened in this case. They went into a server
18 farm and they took some data.

19 To require the Government to have responsibility for
20 all the data, even though it seized a certain amount for its
21 criminal case, is a burden I just don't see how the Court can
22 impose on the Government. And we're not talking a few hundred
23 thousand dollars. We are talking tens of millions of dollars
24 potentially down the road.

25 And that's not necessary here. These servers can be

1 preserved in the civil matters, including the one in front of
2 the Court. There are, the claims by third parties for need to
3 access to all this data can be addressed. If there are
4 out-of-pocket costs that Carpathia experiences, they can apply
5 to the Court for some relief.

6 So, all those things can be dealt with without
7 creating this huge burden on the Government to deal with a
8 massive server farm that it didn't seek to seize.

9 THE COURT: So, what is your overall solution?

10 MR. PRABHU: Your Honor, the Court, because it has
11 authority over a civil matter involving these servers, can
12 order them to be preserved and leave them in the possession of
13 Carpathia. And then they can apply to the Court for any relief
14 related to costs.

15 And on the cost issue, it's important to note that
16 Carpathia is not expending new resources for the storage of
17 these servers. The only cost to them is the ability to
18 repurpose the servers.

19 Now, that's a contractual issue between them and
20 Megaupload and potentially the users that could be resolved in
21 a civil dispute. That's not something that's in the criminal
22 case before the Court.

23 THE COURT: Yeah, but Carpathia now has the ability
24 in the civil context to sell the hard drives to Megaupload.
25 And the preservation order would carry to Megaupload in the

1 civil context, and Carpathia would be out of the, at least out
2 of the responsibility of preserving and paying for the data in
3 the hard drives, right?

4 MR. PRABHU: Actually, I don't think so, Your Honor,
5 because at least one of the potential civil litigants who is
6 here today has said that they don't believe that the infringed
7 data should be in the possession of the infringer. And so,
8 it's trusting the thief with the money.

9 THE COURT: Well, every civil case you sue somebody
10 for infringement of copyrighted material, you know that they
11 have the copyrighted material. And so, every case, virtually
12 every case starts that way.

13 MR. PRABHU: The difference here though, Judge, is
14 that those parties are before the Court, and here they are not.
15 They are fighting extradition from various countries--

16 THE COURT: Well, we have got-- Separate for me the
17 argument-- Because Megaupload is a criminal defendant, a
18 corporate entity who has not been served with a summons. So,
19 they are kind of hanging out there, and that's an issue that
20 maybe we need to talk about as well. But, you know, they are
21 not fighting extradition, correct?

22 MR. PRABHU: Well, the 68 percent shareholder of the
23 company and all of the directors are.

24 THE COURT: Right.

25 MR. PRABHU: And so, the question is, is that-- It's

1 not like a public corporation that they would show up. It's
2 seven people who actually don't want to show up.

3 So, there is a question of whether that has any
4 import because it is a majority controlled company. And we
5 point the Court to 28 U.S.C., just so I get the number right,
6 2466, which talks about the ability of either a defendant, a
7 personal defendant or a corporate defendant to come in and get
8 any benefits from the Court. They are prevented from doing
9 that if they don't willingly appear.

10 But to go back, could Mega, if it had a million
11 dollars in untainted funds, they would have to deal with the
12 preservation demand of the Motion Picture Association. And to
13 my knowledge, they have never satisfied the Motion Picture
14 Association's concerns about the treatment of that data.

15 The point of whether there is child pornography on
16 some of these servers, we've filed under seal some information
17 related to that. But it would be a complicating factor--

18 THE COURT: As I understand it, the Government is not
19 seeking to go back in and look at further data on these
20 servers, correct?

21 MR. PRABHU: That's correct, Your Honor.

22 THE COURT: All right.

23 MR. PRABHU: Thank you, Your Honor.

24 THE COURT: All right, thank you. Why don't we have
25 MPAA and the other third parties that have come in--

1 MR. SMITH: Thank you, Your Honor. Paul Smith.

2 Your Honor, at this point, as the matters have
3 evolved, we really have, the movie studios really have only one
4 primary concern. Which is that these servers with the data on
5 them not find their way back into the stream of commerce and
6 have the Megaupload service reset up.

7 As a technology matter, if you could ship these out
8 of the country to Romania, you could have this whole thing
9 running again. It is probably the largest collection of
10 infringing copies of material in the world.

11 And so, it is a matter of great concern to the
12 studios that they not be dealing with this whole thing all over
13 again. Whether or not the right answer is simply to allow
14 Carpathia to reuse the servers or whether it is to have some
15 other system to preserve them for use in litigation, is not,
16 frankly, at this point our primary concern. As long as the
17 Court and the parties can work out an arrangement that they
18 will be secured and not simply shipped off to Megaupload to
19 start using them again in their criminal enterprise, that's our
20 concern.

21 We had initially gotten very concerned because we
22 heard that there was an arrangement simply to sell them to the
23 principals of Megaupload, not some kind of an evidentiary
24 process or preservation process, but simply that they would get
25 them back. And since many of them are all over the world, it

1 didn't seem to us like that was a particularly good way to deal
2 with stolen goods.

3 And so, I don't want to complicate matters except to
4 make sure that the Court, if it is going to get involved in
5 addressing the ultimate fate of these things, it ought to make
6 sure it doesn't do something that risks that the whole criminal
7 enterprise be restarted in some country where they simply will
8 be beyond the reach of American legal process.

9 THE COURT: I understand. Is there no way to catalog
10 what's in these servers?

11 MR. SMITH: The amount of information is so huge that
12 it would be an extraordinarily expensive process simply to go
13 in there and mirror the whole thing or catalog it. Of course,
14 the Government has a fairly large sample, I think it is 1
15 percent or something that they have taken, but I am not sure
16 that it would be possible to completely catalog it without a
17 very huge effort.

18 THE COURT: I mean, this threat of civil litigation
19 for the copyright infringements, would it not require the
20 Motion Picture Association to go in there and find infringing
21 material?

22 MR. SMITH: Well, the Government now, since we got
23 involved in this, has indicated that they have some thousands
24 of actual copies of works. They also have records of every
25 single work that was on there, so-called hashes, a list of all

1 of them, which you can then match up with works out in the
2 Internet.

3 So, given that the Government has indicated they
4 would almost certainly be subject to a subpoena at an
5 appropriate point in time from a civil proceeding, our concern
6 is less about getting access to them or even preserving them
7 now than it is simply that they be kept secure.

8 THE COURT: Or destroyed.

9 MR. SMITH: Right. I mean, obviously there is
10 concerns, as I am sure the next person will talk about,
11 innocent parties who have private videos up there, but clearly
12 a vast majority of this stuff is infringing and it should not
13 be returned either to the people who posted it or to somebody
14 else who wants to operate another massive criminal enterprise.

15 THE COURT: All right. But the MPAA is not
16 interested in taking possession of the hard drives at this
17 time?

18 MR. SMITH: I am not in a position to make that
19 offer, Your Honor.

20 THE COURT: All right. Thank you, sir.

21 MS. SMITH: Thank you.

22 THE COURT: Good morning, Ms. Davis.

23 MS. SAMUELS: Good morning, Your Honor. Thank you so
24 much for listening to us today. Clearly we're talking about an
25 unprecedented amount of data here. I think everyone can at

1 least agree about that.

2 THE COURT: Yeah.

3 MS. SAMUELS: And we think it's really important that
4 the Court its exercise its equitable jurisdiction here to make
5 sure that individuals like our client, Kyle Goodwin, who did
6 nothing wrong, there is no allegation that Mr. Goodwin did
7 anything wrong, are able to get their private property back.

8 We think this Court is well within its bounds to
9 exercise that type of jurisdiction. It exists in the case law,
10 it exists in the Federal Rules of Criminal Procedure, it exists
11 in RICO and the other relevant statutory provisions.

12 But what I would like to talk briefly about is that
13 while this is not a traditional taking of our client's
14 property, it's not a traditional seizure, it's not a
15 traditional forfeiture, as a practical matter he has got no
16 access to it, absolutely no way to get his property back.

17 And when we start thinking about seizures and
18 forfeitures and we think about how those existed kind of in the
19 brick and mortar world, in those cases innocent third parties
20 can get their stuff back. They can get into their safety
21 deposit in the bank that has been seized. They can get access
22 to their offices in a building that has been seized.

23 But just because we have moved from this analog world
24 to a digital world, doesn't mean that we should kind of throw
25 those rights of the innocent third party out--

1 THE COURT: Who do you think has Mr. Goodwin's
2 property?

3 MS. SAMUELS: Well, that's an interesting question,
4 Your Honor. I think that some combination of a lot of the
5 parties here today have access to his property.

6 I guess physically, they are in Harrisburg, Harris,
7 Virginia. Sorry. Yes, Harrison. But as I understand from
8 talking to the parties and from the papers filed before Your
9 Honor, it's going to require some combination of a bunch of
10 different parties to actually make that happen.

11 Which is why we've proposed some kind of, not short
12 of a traditional receiver, but some kind of independent expert
13 who can help come up with a process for these folks. And, you
14 know, frankly, I don't care who has physical custody of the
15 servers. I don't object if it's the Government, so long as
16 there is some process in place with a time deadline, Your
17 Honor, that creates a way for these folks, Mr. Goodwin and
18 others like him, to, without having to go through the expense
19 of civil federal litigation, be able to get notice that they
20 are able to access their files. Maybe come up with some kind
21 of procedural way for them to attest that their files aren't
22 infringing or otherwise contraband, and we have in place some
23 independent experts who can help make that happen.

24 THE COURT: Well, with my very basic understanding of
25 what this system looks like, at this stage it requires the hard

1 drives all to be energized, the software systems that operate
2 them to be energized, and to give the opportunity for the
3 customers to download whatever they had being stored and
4 retrieve it. Is that essentially what we are talking about?

5 MS. SAMUELS: Well, Your Honor, I don't think we're
6 talking about just flipping a switch back on. I don't think
7 that that is realistic from anyone's perspective at this point.
8 I think we're talking about some kind of procedure where
9 perhaps the Government would have to unfreeze some of the more
10 than \$100 million in assets it seized to allow for these
11 innocent third parties to petition to get their stuff back
12 without having to go through federal litigation.

13 And I think there is some precedent for this. We
14 have seen in the Southern District of New York the online
15 gambling cases, this was all in our papers, and that was
16 agreed, you know, the U.S. Attorney agreed to it. But in that
17 case, a monitor was appointed and the defendant funded that.

18 And, you know, I would just say that I think a lot of
19 this chaos, if you will, especially with regard to our client,
20 was of the Government's making.

21 And what I am also concerned about is that we're
22 seeing more and more of these seizures of Web sites and domain
23 names, this is happening all the time. And I think there needs
24 to be procedures like this from the outset next time so that
25 this can be handled in an organized fashion.

1 THE COURT: How do you handle, you start off by
2 saying there is an incredible amount of data, and then you are
3 now talking about the Government somehow picking its way
4 through the data, which would take literally years and years,
5 and you have got, now you have also, we have just heard from
6 the MPAA, you know, which believes that there are just
7 thousands and thousands of pirated copyright material on there.

8 MS. SAMUELS: I don't think, Your Honor, it's the
9 Government's responsibility to give everyone back their stuff,
10 the 150 million customers, I don't think that's our position.
11 I think the position would be to have some kind of process in
12 place where the owners who, perhaps like Mr. Goodwin, his
13 external hard drive crashes two days before Megaupload goes
14 down, someone like Mr. Goodwin can be in a position where he
15 files some sort of affidavit, some kind of sworn statement,
16 this is what I have, this is where you can find it, please
17 return it. Not just a free-for-all.

18 But we have talked to a lot of people to have lost
19 their data over the course of this, and some of them had
20 back-ups, some of them cared more about their data than others
21 for a whole host of different reasons. And kind of at least
22 give those folks an opportunity to get their stuff back.

23 I think those are very important property rights that
24 I am hoping that the parties will be able to take into account.

25 And I will just like to say one other quick thing.

1 And that is, as that process moves forward, one of the reasons
2 I am particularly glad to be here today is I think it's our
3 client and those who are similarly situated who face the
4 biggest risk of being ignored here. So, I think I am really
5 glad, I am really happy to have the opportunity to be able to
6 talk on behalf of him and others like him.

7 THE COURT: All right. Thank you.

8 MS. SAMUELS: Thank you.

9 THE COURT: All right.

10 MR. BRINKMAN: Your Honor, if you will hear from us,
11 Mr. Rothken will address this issue.

12 THE COURT: Yes, I will hear from you.

13 MR. ROTHKEN: Thank you, Your Honor. Ira Rothken.
14 Thank you for allowing me to speak today.

15 THE COURT: All right.

16 MR. ROTHKEN: I appreciate it.

17 THE COURT: And you are here representing Megaupload,
18 is that correct?

19 MR. ROTHKEN: We are here, respectfully, if the Court
20 would allow us in a limited appearance to--

21 THE COURT: I am going to allow you to appear
22 limited, for purposes of this hearing today on a limited basis.
23 I won't hold you in the case after today.

24 MR. ROTHKEN: Thank you, Your Honor, we are grateful.
25 Your Honor, we have heard from a number of stake

1 holders, and Megaupload has listened to all their views. And
2 while Megaupload firmly believes that it's a dual use
3 technology, that it's capable of substantial noninfringing
4 uses, and that ultimately it's going to prevail, it certainly
5 takes into account the pragmatic notion that there needs to be
6 a compromise.

7 And so, after listening to the MPAA, after listening
8 to Carpathia, after listening to EFF, and after listening to
9 the United States of America, and with the understanding that
10 there is a civil litigation pending where there is a need for
11 litigation hold, it seems like ultimately what should happen
12 here is that the parties should go back and meet and confer.
13 And maybe the meet and confer should be with a special master
14 who could parse out all these different issues, hopefully draw
15 a Venn diagram and figure out a holistic solution.

16 If you take a look at the file, a large number of
17 these issues were discussed, but they weren't discussed in a
18 way where there was robust interaction. These issues were
19 raised. I know that, for example, there is an e-mail in the
20 file where I wrote to the United States Attorney's Office
21 providing very strict conditions upon which Megaupload would
22 get the servers back. In essence, limited to attorney's eyes
23 only or attorney access with licensed forensic examiners like
24 KPMG, and we would use it only in the cases with no consumer
25 access.

1 THE COURT: KPMG has already been in to look at the
2 servers at Carpathia, or the portion that the Government had
3 already seized?

4 MR. ROTHKEN: KPMG, due to their goodwill and due to
5 some begging by yours truly, decided that they would go ahead
6 on their dime, \$30,000, to fly from California here to Virginia
7 to go to Carpathia and image two out of over 1,000 servers to
8 help us in our meet and confer. And they did that. I was able
9 to get the agreement of the United States Attorney's Office to
10 do that.

11 And so, we have analyzed those servers, and that's
12 helping us somewhat in this process. And I can go into detail,
13 Your Honor, if you would like to hear why the rest of the
14 servers and all of them are highly relevant.

15 This is a dual use technology case. Megaupload does
16 not believe that it's responsible for users' primary
17 infringements under the Sony doctrine, under the DMCA, even
18 under the willfulness standard under criminal law.

19 On those servers is evidence of automated processes,
20 software code and alleged content which would demonstrate, for
21 example, that files go through that system about 800 files a
22 second. And that's the kind of evidence, Your Honor, that is
23 highly relevant for a jury to hear. The human eye can't even
24 perceive 800 files per second. That would obviously eviscerate
25 willfulness.

1 That evidence, the software code, the automated
2 systems, in the indictment there is an allegation related to
3 picking and choosing the most popular files and putting them on
4 specially high speed servers. In the Internet industry, that
5 is known as caching, c-a-c-h-i-n-g. The word "caching" does
6 not appear in the indictment. Caching is a substantial
7 noninfringing use. The evidence of that caching is on those
8 servers.

9 Caching is also covered by DMCA 512(b), and that
10 would be another basis for the defense.

11 But the list goes on and on and on, Your Honor, and
12 that is all macro evidence. Micro evidence would include being
13 able to, for Megaupload to call specific users to the stand to
14 ask them how they use the services to show that it was a
15 legitimate cloud storage service. To ask people like Mr.
16 Goodwin how he used it. And to go ahead and pick and choose,
17 after getting access and after having the funds to be able to
18 do it, to ask people, did you store Microsoft word documents?
19 Did people in the military share photos with loved ones back
20 home? It's even possible that the Department of Justice used
21 it, and under that would also show substantial noninfringing
22 uses.

23 So the macro evidence is important, the micro
24 evidence is important and it's highly relevant.

25 In terms of preservation, Your Honor. The cost would

1 essentially be zero to preserve, and let me explain why. This
2 is a multi-- This is a scaleable process. The first thing was
3 that Carpathia and Mega cut a deal through counsel to sell the
4 servers for approximately \$1.25 million, which was the cost of
5 the servers. And that would only be payable after the entire
6 case was over.

7 So, essentially, it was a zero sum gain to the
8 estate. And that would lead to, essentially, preservation
9 equals zero at that point. Then, of course, there is going to
10 be costs with storing them some place that makes sense so that
11 they don't degrade, so that folks who ought to get access to
12 them can. And there is going to be costs associated with that.

13 And then the next part about this, which goes in a
14 large part to EFF and to a certain part to litigants, is how do
15 you make these servers so that they go from not reasonably
16 accessible, which is what the diagram shows, to reasonably
17 accessible so that they are powered on so you could run
18 queries, so you could access them.

19 THE COURT: So, this is essentially a contingency
20 arrangement where if Megaupload or the other defendants are
21 successful in freeing up money that's been already seized under
22 the criminal forfeiture statutes, then whoever is preserving
23 this evidence would be paid for it?

24 If, on the other hand, the Government is successful
25 in its theory of the case where they have had an indictment and

1 a superseding indictment, and their seizure theories include
2 multiple theories where the entire proceeds are forfeitable,
3 then either the preserver gets held holding the bag or the
4 Government has to ultimately free up money to pay whoever has
5 preserved the documents, is that where we are? Is that what
6 you--

7 MR. ROTHKEN: I would have to say generally speaking,
8 yes. But any doubts regarding preservation ought to be
9 resolved in favor of preservation at this point.

10 THE COURT: Who are you proposing be the preserver?

11 MR. ROTHKEN: Your Honor, at this point, given the
12 diverging views on that, we are willing to meet and confer with
13 all the stake holders. I think from Mega's perspective, its
14 preference under Brady and its progeny would be for the United
15 States to be the one who maintains and stores these servers.

16 But notwithstanding that, what's really going on
17 here, too, is a tension between an indictment, as Your Honor
18 mentioned, which is indicting all the revenues from the entire
19 site, and is breathtaking in scope, which then leads to, the
20 overbroad indictment leads to a very harsh economic cost on the
21 e-discovery issues in the case. The broader the indictment,
22 the more costly the e-discovery issues. And that's the honest
23 tension that is going on right here.

24 And meet and confer would certainly, just like one
25 would have in a civil case on e-discovery, I would suggest to

1 the Court that this case is begging for the same type of meet
2 and confer to happen here where the parties could sit down, get
3 a sense of what's fair under the circumstances, maybe even
4 await the results of a Farmer hearing because they may be
5 intertwined, if money could be freed up, and proceed in a very
6 cautious, you know, reasoned manner without there being any
7 kind of harsh destruction.

8 Because there would be no way to unring the bell if
9 the server data is lost. And given the notion that the cost
10 for mere preservation even offline is relatively inexpensive,
11 and given what's at stake in this litigation, I would say to
12 Your Honor that all things unite to say that the data at least
13 for now should be preserved.

14 We would respectfully request that Your Honor order a
15 meet and confer with the assistance of a special master. We
16 distill out the remaining issues for the Court. And once they
17 are crystallized, we bring them back when they are ripe so the
18 Court can actually rule on discrete issues.

19 THE COURT: All right.

20 MR. ROTHKEN: Thank you.

21 THE COURT: Thank you. Yes, sir.

22 MR. HOLMES: If I may heard just very briefly.

23 THE COURT: Yes.

24 MR. HOLMES: I do appreciate it, Your Honor. Again,
25 Cliff Holmes on behalf of Microhits and co-plaintiff Valcom,

1 Incorporated.

2 We are late to this proceeding, Your Honor. We
3 received notice of the emergency motion on April 6, and then
4 were successful in retaining a data forensic expert yesterday
5 and made our filing end of day yesterday, Your Honor.

6 We filed our civil complaint March 21. It alleges
7 contributory copyright infringement, inducement of copyright
8 infringe, and unfair competition. The status of that case is
9 that we've served one defendant, and we are waiting for the
10 proof of service to come back from Hong Kong.

11 We have an understanding that a second defendant
12 agreed to be served yesterday, and similarly we will await the
13 proof of service on that.

14 So, that case is just in the beginning stages.

15 What we submitted yesterday, Your Honor, was an
16 affidavit from our expert, Stevens Miller. And where we were
17 coming at this was that we were hopeful that regardless of the
18 outcome of today's proceedings, is that we could reach an
19 assurance that at a minimum what is referred to as the server
20 log, which again is described in the affidavit, stores the
21 names and dates of access to material on the servers, could be
22 retained.

23 Now we understand that it is a somewhat more vexing
24 issue in the sense that as Carpathia represented, apparently
25 one has to go into the servers to attain a server log, at least

1 with respect to Megaupload data.

2 Again, with my own incipient understanding, being
3 informed by discussions with our expert yesterday, sounds to me
4 as though it may be a deviation from the industry norm. We
5 understand that there are typically server logs maintained
6 independently. So, we are disappointed to hear that, but it is
7 what it is.

8 We are certainly most open to any solution Your Honor
9 should devise, although we do respectfully put forth that
10 destruction as of today would be precipitous and would
11 potentially compromise the civil plaintiffs' interests in the
12 separate case.

13 THE COURT: All right. But your parties aren't
14 interested in taking custody of the data as well?

15 MR. HOLMES: That's the question of the day, Your
16 Honor. As others have similarly articulated, we are not in a
17 position to take possession at this juncture.

18 THE COURT: All right, thank you.

19 MR. HOLMES: All right. Thank you, Your Honor.

20 MR. ZWILLINGER: May I reply very briefly?

21 THE COURT: Yes, sir.

22 MR. ZWILLINGER: Just a couple of things that the
23 Government said I wanted to comment on.

24 The first was that they didn't seek to seize all
25 these servers. The search warrant is under seal, but it has

1 been alluded to, but they went before this very Court and asked
2 for authority to seize all servers leased by Megaupload in this
3 case. And they chose not to exercise it, they came up with
4 some other plan, but that is what they represented to the Court
5 that they wanted authority to do.

6 The second thing is that for the very reason the
7 Government doesn't want it, it shows how unfair the burden is
8 to place on Carpathia. We are not a party to this proceeding.
9 The Government says it is tens of million of dollars and that
10 we can apply to the Court for relief. We just did, we have
11 applied to the Court for relief, and we ask that the Court find
12 a way to get us out of it.

13 The meet and confer suggested by Mr. Rothken, we have
14 met and conferred with everybody, and the Government said they
15 stopped being willing to talk about it once the MPAA filed a
16 preservation letter. But we heard from the MPAA today that
17 their only concern is that it doesn't go back into the wild.
18 They don't actually seek preservation anymore, they say they
19 take no position with regard to destruction.

20 So, it doesn't seem like the MPAA's interest is a
21 reason to stop talking.

22 The final thing I just want to point out to the Court
23 is that we can't put Humpty Dumpty back together again in that
24 data center in Harrisonburg. We don't have the networking
25 equipment, we don't have the ability. This was in four data

1 centers across the country for a reason.

2 The servers are sitting there, but if they are going
3 to be energized, was the word, or allowed, only Mega can know
4 which servers to look at to find the stuff. And Mega has been
5 very clear that they are willing to take it, they are willing
6 to take the servers and we are willing to forgo any payment
7 from them, at least until after the proceeding is over, or we
8 will just lend them servers for free if they promise to return
9 them when the case is over.

10 So, we don't need any payment to give it to Mega.
11 And I would ask that the Court fashion a remedy that either the
12 Government or Mega, the two parties to the case, take it with
13 whatever restrictions the Court believes are appropriate.

14 THE COURT: Okay. The server logs, you don't have
15 access to them, is that your position?

16 MR. ZWILLINGER: That's right, Your Honor. It
17 requires logical access to the data that is on the drives to
18 pull the logs out. I believe Mega would be able to access the
19 server logs. I believe the Government might be as well.

20 THE COURT: But not in the present form of the hard
21 drives?

22 MR. ZWILLINGER: They would have to be plugged in
23 and-- The hard drives can be staged, each server can be staged
24 in Harrisonburg on a one-server-at-a-time basis, plug in a
25 server, higher a forensic consultant, pull the server logs out.

1 I don't think the Government was quite necessarily
2 accurate that we could just do it because they did it, they
3 knew the passwords. The Government's forensic experts must
4 have found a way to do it, but that would require an additional
5 cost. We can't just do it, pull the server logs out, we can't
6 access the data ourselves.

7 THE COURT: All right. Thank you.

8 All right. Well, I think the meet and confer is a
9 great idea. And I am sure that the Government will participate
10 in the meet and confer and see if we can't work something out.

11 Judge Anderson is terrific at getting people to come
12 together and solve problems. He does it on a daily basis. And
13 I am going to have you call Judge Anderson and see when you can
14 get in to see him.

15 If you want to pay a special master, because I am not
16 going to pay one, but you have got Walt Kelley sitting in the
17 middle of the courtroom here who does that on a fairly regular
18 basis for a handsome sum of money, and he looks tanned and
19 rested and ready. So, if Judge Anderson isn't the answer, then
20 I invite you to get a special master of your own choice.

21 Let's do that within the next two weeks and get your
22 calendars together. I realize you probably all have electronic
23 calendars, and none of them found their way into the courtroom,
24 courthouse, but let's get together and see if you can't work it
25 out.

1 If not, let me know and I will make a decision, and
2 we will go from there. That's as far as I think we are going
3 to go today in hearing any of the issues before me.

4 The appearance for a Farmer hearing, I am going to
5 put off for now. I have got a couple issues, and I think there
6 is further briefing that is going to be necessary on that
7 because Megaupload is a separate entity and they haven't been
8 served. And I have some, obviously some reservations in using
9 my resources, but also the Government resources at this stage.
10 As long as evidence is not being destroyed, I frankly don't
11 know that we are ever going to have a trial in this matter.
12 And the beginning, getting the train rolling down the hill at
13 this stage, I think is premature unless I am convinced
14 otherwise. But we will save that for another day.

15 All right. All right. Thank you all. I appreciate
16 the briefing. And you see how far you can get, and hopefully I
17 will get a good report.

18 Have a good weekend everybody. Thank you.

19 -----
20 HEARING CONCLUDED

21 I certify that the foregoing is a true and
22 accurate transcription of my stenographic notes.
23

24 /s/ Norman B. Linnell
25 _____
Norman B. Linnell, RPR, CM, VCE, FCRR